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In The
Supreme Court of the United States
October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

REPLY ON MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE APPELLATE OPINION AND DECISION FOR WANT OF JURISDICTION

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PROPRIETY OF REPLY

Because the federal courts never obtained subject matter jurisdiction (Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124-28, 1131-32 (1996)), the State defendants moved to grant a writ of certiorari and to vacate the appellate opinion and decision. Plaintiffs erroneously declare it "a fact that the State of Wisconsin

has expressly waived its sovereign immunity with respect to actions for overtime wages brought pursuant to the provisions of the Fair Labor Standards Act. §§ 109.01(2), 109.01(3), 109.03(5), 103.01(1)(b), 103.02, Wis. Stats. and Ind. §§ 74.01(4), 74.015, 74.08 Wis. Adm. Code." (Plaintiff's Opposition to Motion, p. 2.)[1] Replies on motions are permitted. Stern *et al.*, Supreme Court Practice, § 16-7, p. 642, n.6 (7th ed. 1993). The State defendants now correct this misstatement.

NO CONSENT TO FLSA SUITS

Through a complicated set of citations, plaintiffs assert the Wisconsin Legislature authorized suit against the State in federal court under the FLSA. Close examination of these citations belies the assertion.

The purpose of ch. 109, Wis. Stats., is not to grant employes a court forum to assert disputed FLSA claims but instead to assure the prompt payment of wages indisputably owed. *E.g.*, Employees Local 2901 v. Brown County, 140 Wis. 2d 850, 854, 412 N.W.2d 167 (Ct. App. 1987), *aff'd*, 146 Wis. 2d 728, 432 N.W.2d 571 (1988); Kenosha Fire Fighters v. City of Kenosha, 168 Wis. 2d 658, 665, 484 N.W.2d 152 (Ct. App. 1992) (purpose to "obtain prompt payment of *wages which are due*"), italics in original; Massachusetts v. Morash, 490 U.S. 107, 109, n.2 (1989) (listed as "wage payment" statute). If payment of these wages is delayed, both civil and criminal penalties may be imposed. § 109.11(2) and (3), Wis. Stats.

The Wisconsin Legislature, in allowing employes to seek "civil penalties" in "court" (§§ 109.03(5) and 109.11(2), Wis. Stats.), plainly meant Wisconsin circuit

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[1]The cited regulations are now in Wis. Admin. Code ch. ILHR 274. Applicable Wisconsin statutory and regulatory provisions, are made part of an Appendix to this reply.

court. *See* references to "circuit court" in §§ 109.09(1), 109.09(2), 109.11(1)(c), 109.11(2)(a), 109.11(2)(b), Wis. Stats. No reference is made to federal courts. Like other state law claims, federal jurisdiction would not derive from the State statute itself. *E.g.*, Jackman v. WMAC Investment Corp., 610 F.Supp. 290 (E.D.Wis. 1985) (diversity jurisdiction), *aff'd*, 809 F.2d 377 (7th Cir. 1987); Henne v. Allis-Chalmers Corp., 660 F.Supp. 1464, 1483 (E.D.Wis. 1987) (pendent jurisdiction).

It is unlikely the Legislature authorized civil and criminal "penalties" to be imposed on the State itself even to enforce, in Wisconsin circuit court, the wage payment requirements of ch. 109, Wis. Stats. *E.g.*, State v. P.G. Miron Construction Co., Inc., 181 Wis. 2d 1045, 1052-53, 512 N.W.2d 499 (1994), *reconsideration denied* (intent to consent to State court action against State must be clear and express). If that were the legislative intent, Eleventh Amendment immunity against federal court actions would not be diminished since State legislatures must clearly and expressly consent to suit in "'*federal court*.'" *E.g.*, Port Authority Trans-Hudson v. Feeney, 495 U.S. 299, 305-306 (1990), italics in original.

Court actions under ch. 109, Wis. Stats., differ from FLSA court actions. Even the Wisconsin agency authorized to enforce the state statute lacks power to seek "liquidated damages" -- standard in FLSA lawsuits (*e.g.*, Walton v. United Consumers Club, Inc., 786 F.2d 303, 309 (7th Cir. 1986), *rehearing and rehearing en banc denied*) -- because those damages are not among the wages recoverable. DILHR v. Coatings, Inc., 126 Wis. 2d 338, 344-45, 376 N.W.2d 834 (1985). *See* § 109.11, Wis. Stats.

The civil penalty actions allowed employes by Ch. 109, Wis. Stats., are wholly unrelated to the FLSA. Plaintiffs try to make a connection by citing a different statutory scheme, §§ 103.01 to 103.03, Wis. Stats. (*cf.* Erdman v. Jordan, 181 Wis. 2d 736, 749, n. 6, 512 N.W.2d

487 (1994)) (recognizing Chs. 103 and 109, Wis. Stats., create two different schemes) and Wisconsin agency regulations adopted under that scheme. Wis. Admin. Code §§ ILHR 274.04 and 274.08. The authority for the regulations is "s. 103.01(1), Stats.," not Ch. 109, Wis. Stats. Wis. Admin. Code § ILHR 274.015. Other regulations confirm that Ch. 109, Wis. Stats., and Wis. Admin. Code ch. ILHR 274 impose distinct requirements. Wis. Admin. Code § ILHR 277.07(2) (noting distinction between "meet[ing] the requirements of the . . . Wisconsin labor standards laws applying to the payment of . . . overtime, ch. ILHR 274, and complying with the wage payment and collection law, ch. 109, Stats.").

Like the FLSA, §§ 103.01 to 103.03, Wis. Stats., controls the maximum "hours of labor" employes may be required to work and authorizes a Wisconsin agency to determine when overtime pay must, under **Wisconsin** law, be paid by employers. §§ 103.01 to 103.03, Wis. Stats. Employes are not authorized to enforce these State overtime requirements even in Wisconsin circuit court. § 103.02, Wis. Stats. They must file complaints with a Wisconsin agency authorized to investigate and issue orders. *Id.* The sole court action an employe may pursue is to challenge those agency orders in circuit court through limited judicial review procedures. *Id.*

Only the agency may seek judicial enforcement of its orders. §§ 101.02(5)(f) and 103.02, Wis. Stats. In doing so, that agency can pursue the "penalties" in § 109.11, Wis. Stats., against private employers who violate the overtime requirements in Wis. Admin. Code § ILHR 274.03, court "penalties" under § 109.11, Wis. Stats. Wis. Admin. Code § ILHR 274.07. The agency may not pursue those "penalties" against public employers because Wis. Admin. Code § ILHR 274.03 does not apply to public employers. Wis. Admin. Code § ILHR 274.08(2).

The Wisconsin overtime regulations establish separate standards for public employes by tracking some FLSA standards while, by omission, excluding other FLSA standards. Wis. Admin. Code §§ ILHR 274.04 and 274.08. Ironically, 29 C.F.R. § 541.118, an interpretation of general application rather than a regulation specific to government employment (*e.g.*, Klein v. Rush Presbyterian-St.Lukes, 990 F.2d 279, 283, 285 (7th Cir. 1993)), is **not** on the short list of FLSA materials Wisconsin uses to apply §§ 103.01 to 103.03, Stats., to public employes. Wis. Admin. Code § ILHR 274.08(2) (accepting, as standards for exempt status of public employes, only the FLSA itself, 29 C.F.R. Part 553 and other "regulations" specifically related to state and local governments). The State overtime structure, though similar to the FLSA, stands separate from it and precludes private causes of action.

The citations presented by plaintiff can not be construed as a clear and express legislative surrender of Eleventh Amendment immunity allowing federal court lawsuits against the State of Wisconsin under the FLSA.

Respectfully submitted,

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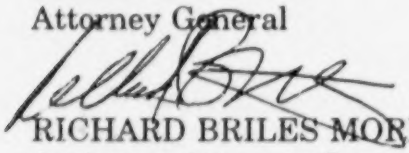

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APPENDIX

WISCONSIN STATUTES

Section 101.02(5)(f), Wisconsin Statutes, provides, in relevant part:

> (f) Upon the request of the department [of industry, labor and human relations], the department of justice or the district attorney of the county in which any investigation . . . had under ss. 101.01 to 101.25 is pending, shall aid therein and prosecute under the supervision of the department [of industry, labor and human relations], all necessary actions or proceedings for the enforcement of those sections and all other laws of this state relating to the protection of life, health, safety and welfare, and for the punishment of all violations thereof.

Chapter 103, Wisconsin Statutes, provides, in relevant part:

CHAPTER 103 EMPLOYMENT REGULATIONS

> **103.01 Hours of labor; definitions.** In ss. 103.01 to 103.03:
>
> **(1)** . . .
>
> (b) "Employer" includes the state [and entities of the state].
>
> . . .
>
> **103.02 Hours of labor. . . .** The department [of industry, labor and human relations] shall investigate, ascertain, determine and fix such reasonable classification, and promulgate rules fixing a period of time, or hours of beginning and

ending work during any day, night or week, which shall be necessary to protect the life, health, safety or welfare of any person, or to carry out the purposes of ss. 103.01 to 103.03. The department shall, by rule, classify such periods of time into periods to be paid for at regular rates and periods to be paid for at the rate of at least one and one-half times the regular rates. Such investigations, classifications and orders shall be made pursuant to the proceeding in ss. 101.01 to 101.25 which are hereby made a part hereof, so far as not inconsistent with ss. 103.01 to 103.03, and every order of the department shall have the same force and effect as the orders issued under ss. 101.01 to 101.25 and the penalties therein shall apply to and be imposed for any violation of ss. 103.01 to 103.03. Such orders shall be subject to review in the manner provided in ch. 227 [providing for judicial review of agency orders]. . . .

103.025 Hours of labor; compensatory time.

. . .

(2) An employer described in s. 103.01 (1)(b) may provide an employe, in lieu of overtime compensation, compensatory time off as permitted under 29 USC 207 (o), as amended to April 15, 1986.

103.03 Violations; penalty. . . . Every day for each person employed, and every week for each person employed, during which any employer fails to observe or to comply with any order of the department, or to perform any duty enjoined by ss. 103.01 to 103.03, shall constitute a separate offense.

Chapter 109, Wisconsin Statutes, provides, in relevant part:

CHAPTER 109 WAGE PAYMENTS, CLAIMS AND COLLECTIONS

109.01 Definitions. As used in this chapter:

(1) "Department" means the department of industry, labor and human relations.

(2) Except as provided in s. 109.07(1)(d), "employer" means any person . . . including the state and its political subdivisions . . . . .

(3) "Wage" or "wages" mean remuneration payable to an employe for personal services, including salaries, commissions, holiday and vacation pay, overtime pay, severance pay or dismissal pay, supplemental unemployment compensation benefits when required under a binding collective bargaining agreement, bonuses and any other similar advantages agreed upon between the employer and the employe or provided by the employer to the employes as an established policy.

(4) "Wage deficiency" means the difference between the amount required by law to be paid and the amount actually paid to an employe.

109.03 When wages payable; pay orders.

(1) REQUIRED FREQUENCY OF PAYMENTS. Every employer shall as often as monthly pay to every employe engaged in the employer's business, [with exceptions], all wages earned by such employe to a day not more than 31 days prior to the date of such payment. . . . [with further exceptions]

. . .

(5) ENFORCEMENT. Except as provided in sub. (1), no employer may by special contract with employes or by any other means secure exemption from this section. Each employe shall have a right of action against any employer for the full amount of the employe's wages due on each regular pay day as provided in this section and for increased wages as provided in s. 109.11(2), in any court of competent jurisdiction. An employe may bring an action against an employer under this subsection without first filing a wage claim with the department under s. 109.09 (1). An employe who brings an action against an employer under this subsection shall have a lien upon all property of the employer, real or personal, located in this state as described in s. 109.09(2).

. . .

109.09 Wage claims, collection.

(1) . . . The department shall enforce this chapter and . . . [s.] 103.02, ... In pursuance of this duty, the department may sue the employer on behalf of the employe to collect any wage claim or wage deficiency and ss. 109.03 (6) and 109.11 (2) and (3) shall apply to such actions. . . . [T]he department may refer such an action to the district attorney of the county in which the violation occurs for prosecution and collection and the district attorney shall commence an action in the circuit court having appropriate jurisdiction. . . .

(2) . . . A lien under this subsection takes effect when the department or employe files a verified petition claiming

the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed pays the fee specified in s. 814.61 (5) to that clerk of circuit court and serves a copy of that petition on the employer by personal service in the same manner as a summons is served under s. 801.11 or by certified mail with a return receipt requested. . . .

109.11 Penalties.

(1) . . .

(c) If an employer does not agree to compromise and settle a wage claim under this subsection, the department may refer the wage claim to a district attorney under s. 109.09 (1) or to the department of justice under s. 109.10 (3) for commencement of an action in circuit court . . . .

(2) CIVIL PENALTIES. (a) In a wage claim action that is commenced by an employe [before agency proceedings are completed], a circuit court may order the employer to pay to the employe, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50% of the amount of wages due and unpaid.

(b) In a wage claim action that is commenced after [agency proceedings are completed], a circuit court may order the employer to pay to the employe, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 100% of the amount of wages due and unpaid.

(3) CRIMINAL PENALTIES. Any employer who, having the ability to pay,

fails to pay the wages due and payable as s provided in this chapter or falsely denies the amount or validity thereof or that such wages are due, with intent to secure any discount upon such indebtedness or with intent to annoy, harass, oppress, hinder or defraud the person to whom such wages are due, may be fined not more than $500 or imprisoned not more than 90 days or both. Each failure or refusal to pay each employe the amount of wages due at the time, or under the conditions required in this chapter constitutes a separate offense.

WISCONSIN REGULATIONS

Wisconsin Administrative Code Chapter ILHR 274 provides, in relevant part:

Chapter ILHR 274 HOURS OF WORK AND OVERTIME

ILHR 274.01 Definitions.

. . .

(4) "Overtime" means hours in excess of 40 hours of work per week. . . .

ILHR 274.015 Applicability of chapter. Pursuant to s. 103.01 (1), Stats., [these regulations are adopted].

ILHR 274.03 Overtime pay. Except as provided in s. [ILHR 274.08], each employer subject to this chapter shall pay to each employe time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week.

ILHR 274.04 Exemptions. Except as provided in s. ILHR 274.08, each employer

subject to ch. ILHR 274 shall be exempt from the overtime pay requirements in s. ILHR 274.03 and these exemptions shall be interpreted in such a manner as to be consistent with the Federal Fair Labor Standards Act and the Code of Federal Regulations as amended, relating to the application of that act to all issues of overtime in respect to the following employes:

[detailed definitions of meaning of criteria for exemptions.]

. . .

ILHR 274.07 Penalties. Any employer who violates order s. ILHR 274.02, 274.03 or 274.06 shall be subject to the penalties provided in ss. 101.02 and 109.11, Stats. Each day of violation shall constitute a separate and distinct offense.

ILHR 274.08 Coverage of public employes.

(1) This section applies to employes of the state, its political subdivisions, and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(2) The provisions of ss. ILHR 274.03 through 274.06 regarding overtime pay, exemptions, and records shall not be applicable to employes identified in sub. (1). The provisions applicable to employes identified in sub. (1) shall be the provisions of the federal Fair Labor Standards Act, 29 CFR Part 553, the regulations of the U.S. department of labor relating to the

application of the Act to employes of state and local governments, and other federal regulations relating to the application of the Act to overtime issues affecting employes of state and local governments.